Supreme Court, U.S.
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No. 88-1710

In The

Supreme Court of the United States

October Term, 1989

THOMAS H. GREENE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Can an indictment attempting to charge violations of 18 USC § 1014 by false statements to a bank "in connection with a request and application to settle an outstanding judgment," but lacking allegations of an underlying bank loan within the purview of the statute, be treated as noticing or incorporating that conceded "essential element" by its closing recital, "in violation of Title 18, United States Code, Section 1014"?

II. Can such an indictment be so remedied by the Court of Appeals when the conceded "essential element" was omitted also from the trial court's instructions to the jury defining the offense, which instead declared, "False statements to a federally insured bank during negotiations to settle a judgment can constitute a crime under 18 U.S.C. Section 1014"?

III. Was the accused denied Fifth and Sixth Amendment rights to trial on a Grand Jury indictment when, on a charge that he knowingly and willfully made or caused false statements to *Bank B* with intent to influence that bank on a loan application to that bank, and on proofs susceptible of either that finding or that he made and intended statements only to *Bank A* by an application form he sent only to *Bank A*, the trial court instructed the jury, "It is not necessary, however, to prove . . . that the Defendant knew which particular institution was involved so long as the Defendant intended it to be presented to some federally insured bank"?

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PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

Replying on Questions I and II (counts 1, 2 and 3):

1.

The heart of the Eleventh Circuit's remedy for this Grand Jury indictment, otherwise deficient for want of a conceded "essential element," is found in the Court's footnote 4, Pet. A6, n. 4. The Government too speaks of this only in a footnote, Brief Op. p. 7, n. 3, saying "the indictment did not have to specify that the debt involved a defaulted bank loan"; that what the Court said in its footnote 4 "merely meant that in the court's view the judgment had to arise from a loan in order for the judgment to be within the reach of Section 1014"; that the Court "did not mean that the origin of the judgment . . . had to be included in the charging language in order for the indictment to state an offense." Gov't Brief Op. p. 7, n. 3.

The suggested distinction between what the Court "merely meant" and "did not mean" eludes us. The Court's footnote 4 seems lucid and purposeful enough. The Court said and meant that the antecedent loan element was "essential" so, in the Government's phrase, it "had to be included in the charging language." That was deemed accomplished by the indictment's closure phrase referring to § 1014.

Clearly enough, the Court of Appeals exemplified what it was doing by citation to *United States v. Stefan*, 784 F.2d 1093 (11th Cir.), *cert. denied*, 479 U.S. 1009 (1986), where "willfulness" was (arguably) missing from the indictment but was noticed by the Court in the statute by

virtue of a closure phrase, "in violation of 18 USC § 1001." In *Stefan's* antecedents was a Fifth Circuit decision, *United States v. Varkonyi*, 645 F.2d 453, 456 (5th Cir. 1981) (*see* Pet. Cert. pp. 16-17), which illustrated the methodology more dramatically than did *Stefan*, but not more so than here in Greene's case.

The Court's reasoning was utterly without guile: Greene's indictment needs the "essential element" of an antecedent loan, more so even than Stefan's indictment needed willfulness. "This reasoning," the Court's own reasoning, the Court said (862 F.2d at 1515, Pet. A6 n. 4),

> makes the nature of the debt underlying the judgment an essential element of the case. For example, if Greene had hit the bank with his truck, lost a damage suit, and then lied to get a better settlement, section 1014 would not be implicated. Lying to a bank during settlement negotiations on a judgment is only a federal crime when a loan underlies the debt judgment.

An "essential element" being missing, the Court supplied it to the indictment according to the accustomed methodology of *Stefan* and *Varkonyi, Id.*:

> Greene argues that the indictment is fatally defective for alleging only a judgment debt and failing to allege a "judgment debt arising from a defaulted loan." We find the indictment sufficiently definite and clear, certainly providing Greene with "adequate notice of the charges against him." *United States v. Stefan*, 784 F.2d 1093, 1102 (11th Cir. 1986) (indictment found adequate in spite of failure to specifically allege essential element of willfulness in prosecution under 18 U.S.C.A. § 1001).

2.

The Government is in error saying Greene "did not contest the sufficiency of the indictment on the ground that it should have specified the source of the judgment" (Gov't Brief Op. p. 3, also p. 7 fn. 4). [The Court of Appeals made no such suggestion obviating a need to find in the statute an "essential element" omitted from the indictment.] Greene moved to dismiss the first indictment, alleging only "a request to settle an outstanding judgment," R1-1-1, 2, 3, as follows. R1-62-3:

> 13. Counts One, Two and Three fail to allege that the alleged false statements were made in connection with "any application, advance[,] discount, purchase, purchase agreement, re-purchase agreement, commitment or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release or substitution of security therefor . . . " as required by Title 18, U.S.C.A. §1014.

In support of that motion to dismiss Greene argued, R1-66-4: "It is the contention of the defendant in the instant case that 'a request to settle an outstanding judgment' is not one of the listed activities in §1014."

When the Government then got a superseding indictment supplying *its* choice of "one of the listed activities in § 1014" – "a request and *application* to settle an outstanding judgment," Pet. A14 e.a. – Greene attacked that allegation as well, saying R1-84-3, 4:

> The Government, in its superseding indictment, added the word "application." This is the only change in an attempt to charge the offense under §1014. So for the first time, the Government has selected one of the listed words in the statute, about which the defendant is alleged to have made a false

> statement, i.e., an "application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor. . . ."
>
> The Government, in relying upon the listed word of "application," clearly misunderstands the clear intent of § 1014. . . .

By argument before and after he secured the new indictment, the prosecutor sought to bolster the charge by referring to an underlying loan not alleged – to which Greene replied that no such loan would survive merger in the judgment already described by the indictment. Def. Mem. in Support of Def. Mot. to Dismiss the Superseding Indictment, R1-84-2, 3, 6. The Government now asserts, Brief. Op. p. 7 n. 4, that Greene "conceded" an antecedent loan in those early District Court arguments. This novel waiver theory is not found in the Court of Appeals decision of which conflict review is sought. That decision in no way suggests that in-chambers argument over the significance of anticipated proof can take the place of a Grand Jury indictment charging all essential elements.

Indeed as the Petition demonstrates pp. 4 and 5, the "loan" element was a fugitive in the trial court, in or out of the offense depending on the Government's pleasure from time to time. The antecedent loan disappeared when the court instructed the jury on essential elements, and when the jury convicted Greene. It reappeared only when useful to affirm the conviction – when the Court of Appeals acknowledged "this reasoning makes the nature of the debt underlying the judgment an essential element of the case," and the Court by closure phrase magic

exemplified in *Stefan* borrowed the missing element from the statutory laundry list.

There could be no more suitable case for examining the vitality of this Court's Fifth and Sixth Amendment doctrine as established these many years.

Replying on Question III (count 4).

Question III pertaining to count 4 should be taken for review with Questions I and II because the vitality of Fifth and Sixth Amendment standards for indictments depends quite as much on Petit Juries being expected to respect the essential allegations made by Grand Juries, as on Grand Juries being expected, themselves, to allege those essential elements.

The Government says the trial court did not dispense with an essential allegation in Count 4 by telling the Petit Jury it was unnecessary for the Government to prove as the Grand Jury charged (Pet. A17) that Greene "knowingly and willfully" made or caused a false statement to Marine Midland Bank on an application form that Greene himself sent only to the bank whose form it plainly was, Peoples Bank of Rockland.

The jury instruction, R18-257-205 e.a., was this:

> *It is not necessary, however, to prove* that the institution involved was, in fact influenced or even misled, or that they relied on the document in question, or *that the Defendant knew which particular institution was involved so long as the Defendant intended it to be presented to some federally insured bank.*

Again, the gist of this offense or crime is an intent to influence *such an institution* by willfully

making a false statement or report concerning the matter.

The Government says this instruction "did not make it possible for the jury to convict petitioner based on his application to the Peoples National Bank," Gov't Br. Op. p. 9, because "the indictment and the special verdict form ensured that the jury in fact convicted petitioner of . . . submitting a false statement to the Marine Midland Bank."

The indictment "ensured" nothing of the kind. After hearing the trial judge declare "It is not necessary, however, to prove . . . that the Defendant knew which particular institution was involved so long as the Defendant intended it to be presented to some federally insured bank," such a finding wasn't "ensured" by the special verdict form, either.

In fact, the verdict form was entirely consistent with the trial court having declared "it is not necessary, however," to prove the Grand Jury charge that Greene "knowingly and willfully" made or caused false statements to Marine Midland as distinguished from Peoples. The verdict form simply excised "knowingly and willfully" from the indictment (R4-196, e.a.):

COUNT IV GUILTY X NOT GUILTY ___

If you find the defendant guilty as to Count IV, please specify which statement(s) have been the basis of your verdict:

(1) That THOMAS H. GREENE *did submit and caused to be submitted* an application for a loan to the Marine Midland Bank, N.A., which stated in substance that he had no unsatisfied judgments against him within the last seven years, whereas in truth and

in fact, THOMAS H. GREENE, then well knew he did have unsatisfied judgments against him within the last seven years.

YES X NO ___

(2) That THOMAS H. GREENE *did submit and cause to be submitted* an application for a loan to the Marine Midland Bank, N.A., which stated in substance that his only debt was a $137,000 debt to Security First Federal Savings and Loan, Daytona Beach, Florida, whereas in truth and in fact, THOMAS H. GREENE, then well knew that he did have debts other than the $137,000 debt he reported.

YES X NO ___

CONCLUSION

This case is worthy of review on each of the three Questions Presented. The Eleventh Circuit's undermining of familiar Fifth and Sixth Amendment principles was no accident here, it was purposeful – the most striking instance yet of doctrine that, in that Circuit at least, radically alters settled law. Whether this Court is inclined to approve or not this closure phrase doctrine, the Court's superintendence of Constitutional jurisprudence requires that the Petition be granted.

Respectfully submitted,

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July 17, 1989.